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No. 799

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

BOARD OF PARDONS AND PAROLES OF TEXAS, and/or A. C. TURNER, PAT BULLOCK, and JACK ROSS, members of such Board,

Petitioner

v.

FRANCIS MARION BLACK,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CRAWFORD C. MARTIN
Attorney General of Texas
GEORGE M. COWDEN
First Assistant Attorney General
A. J. CARUBBI, JR.
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Petitioner

v.

FRANCIS MARION BLACK,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 13, 1967.

OPINION BELOW

The Opinion delivered in the court below is not yet officially reported, but is appended to this Petition as Appendix "A." On October 6, 1967, the Honorable Hugo L. Black, Associate Justice of this Court, entered his Order extending the time to file petition for writ of certiorari in this cause until and including November 10, 1967.

JURISDICTION

As indicated above, the judgment of the Court of Appeals below was entered on July 13, 1967. A copy of this judgment is attached hereto as Appendix "B." The time for filing the petition for writ of certiorari has been extended until November 10, 1967, a copy of said order being attached as Appendix "C." The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether *Sims v. Georgia,* 385 U.S. 538 (1967), determined that the holding in *Jackson v. Denno,* 378 U.S. 368 (1964), should be given only prospective application and should not be applied to cases tried and finally decided before the date of the *Jackson* decision.

2. Whether the evidence adduced at Respondent's state court trial in 1938 raised the issue of voluntariness and if so, did Respondent waive a determination of the voluntariness issue by his failure to make proper objection.

3. Whether the court below was correct in deciding that Respondent be given a *Jackson v. Denno* hearing in the state courts (should it be determined that Jackson v. Denno is to be given restrospective effect), when Respondent was tried in 1938 in the state courts of Texas and later raised the issue of voluntariness in a Federal habeas corpus proceeding in 1961 wherein Respondent's contention that his statement was involuntary was determined adversely to Respondent after an evidentiary hearing.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of Amendment Fourteen, Section 1, United States Constitution, barring the use of involuntary confessions in state prosecutions is involved in this case.

STATEMENT OF THE CASE

On June 22, 1938, the Respondent was convicted in the state dstrict court after a jury trial, at which he was represented by attorneys of his own choosing, of a crime of murdering his recently "adopted" son by pushing him from the top of a 400-foot cliff. (Respondent's Exhibit No. 2, page 15; Respondent's Exhibit No. 1, pages 21, 25, 78, 94-97.) The evidence adduced at the trial indicated that the Respondent had insured the boy's life for $5,000.00, that he had made other inquiries concerning insurance, and that he had attempted to kill the boy on other occasions. (Resp. Ex. No. 1, pp. 21, 23-28, 43, 60-65, 94-97.)

(The Exhibits introduced at the habeas corpus hearing held in the Federal District Court were transmitted to the court below for its consideration. These Exhibits are also on file with this Court. They are referred to above by the same designation given them in said district court.)

The punishment assessed Respondent was death. (Resp. Ex. No. 2, p. 15.) The conviction was affirmed by the Texas Court of Criminal Appeals in *Black v. Texas,* 128 S.W.2d 406 (1939). Later, the Governor of Texas commuted the death sentence to life imprisonment. (Resp. Ex. No. 7.)

REASONS FOR GRANTING THE WRIT

1. The decision of this Court in *Sims v. Georgia,* supra, suggests that the holding in *Jackson v. Denno,* supra, is not to be applied retrospectively and accordingly, the decision of the court below, resting as it does on *Jackson v. Denno,* is erroneous.

While Petitioner is aware of the statements made by this Court in *Johnson v. New Jersey,* 384 U.S. 719 (1966), to the effect that *Jackson v. Denno* will be given retroactive application, this Court indicated in *Sims v. Georgia* (decided after *Johnson v. New Jersey*) that *Jackson v. Denno* would be binding only on state court trials held subsequent to *Jackson v. Denno.* In *Sims* this Court stated as follows:

> ". . . *Jackson,* having been decided June 22, 1964, was binding on the courts of Georgia in this case, it having been tried October 7, 1964. Such rule is, as we have said, a constitutional rule binding upon the States and, under the Supremacy Clause of Article VI of the Constitution, it must be obeyed."

Certainly the implication of the above quoted language is that *Jackson* should be applied only prospectively. This viewpoint was accepted by the Supreme Court of New Jersey in *State v. Broxton,* — N.J. —, 230 A.2d 489, 496, 497, decided May 29, 1967, wherein the Court noted:

> "*Sims v. Georgia,* 385 U.S. 538, . . . (suggests) that *Jackson v. Denno* should have no application to cases tried before the date of that decision."

The proper application of *Jackson v. Denno* is the underlying issue in a great many cases arising in both

the state and federal courts. Accordingly, the question as to the application of *Jackson v. Denno,* whether retroactive as is suggested by *Sims v. Georgia,* is an extremely important question that should be laid to rest by this Court once and for all.

2. The court below incorrectly applied *Jackson v. Denno* to the facts of this case because no real issue concerning the voluntariness of the Respondent's confession was raised at his state court trial in 1938; and if the issue can be said to have been raised, the court failed to apply proper waiver standards in reaching this decision.

In failing to recognize the waiver of the voluntariness issue, the decision of the court below is in conflict with the decision of the Court of Appeals for the District of Columbia in *Woody v. United States,* 379 F.2d 130 (1967).

A Statement of Facts of the evidence adduced at the state court was introduced at the federal district court hearing as Respondent's Exhibit No. 1 and is among the papers of this cause presently on file in this Court. The testimony of the Respondent concerning the confession, together with a cross-examination, is set out in this Statement of Facts.

When the Respondent's confession was offered into evidence (Page 88 of the Statement of Facts), the defense counsel took the witness then on the stand on voir dire and after a series of questions, the following occurred at Page 94:

> "MR. JACKSON: The State again offers the statement in evidence.
>
> MR. OWENS: We object and don't think that

sufficient evidence has been offered to permit the confession to be introduced. No proper predicate has been laid.

THE COURT: I will overrule the objection made.

MR. OWENS: We except.

"The Statement offered by the State, was marked 'Exhibit 6, EH' for identification, and is as follows: . . ."

The defense did not at this time offer the testimony of the Respondent (or of any other witness) on the issue of voluntariness, Respondent testifying concerning the confession only after the State had rested. (See page 97, where the State rested, and page 137 where the defendant took the stand to offer his evidence in the case).

After the defendant had testified concerning certain facts which may or may not have raised the issue of voluntariness, no additional or further objection was voiced by the defense concerning the admissibility of the confession.

The court below conceded that Respondent's attorney "did not make a precise challenge to the admission of the confession on the ground that it was not voluntarily made," but the Court went on to reject this Petitioner's assertion that there was a waiver under the facts presented.

This holding by the court below is in direct conflict with the holding in *Woody v. United States*, supra, wherein the court first observed:

". . . Not only did Appellant fail to make objection to use of the statements, but he also denied making them."

and then concluded:

> ". . . Appellant never contested the voluntariness of the statements and never asked for a hearing on voluntariness; we see no basis for a remand to afford him an opportunity to make a claim he has heretofore eschewed."

The conflict between the Circuits should be resolved by this Court.

3. The decision of the court below is erroneous in applying *Jackson v. Denno* to this case where the state court trial occurred in 1938 and a federal district court had adversely determined Respondent's contention that his confession was involuntary in a habeas corpus proceeding held in 1961.

Here, Respondent had sought habeas corpus from the Federal District Court for the Southern District of Texas in the year 1961. That court, after an evidentiary hearing on the issue of voluntariness, determined that:

> ". . . (no) improper methods were used upon petitioner during the time of his arrest and the signing of the confession, . . .
>
> ". . . Petitioner's (Respondent here) own testimony at the trial negatives a conclusion that force was used upon him during his short retention prior to confession, . . .
>
> ". . . his testimony clearly shows that the confession was not had as a result of any prolonged questioning . . .
>
> ". . . he had studied engineering 3 years at the University of Kansas. . . .
>
> ". . . he was then, and is now, a person who appears to be strong physically. . . ."

"From a consideration of the entire transcript, a statement of facts, and the record, the court is of the opinion that the confession was not the result of any coercion or threats of force or promises but was a voluntary one. The court is further of the opinion that there was no lack of due process in the proceedings of the State Court Trial and that there was no violation of the constitutional rights of the petitioner."

It seems clear that an adequate determination of the voluntariness was made in this federal habeas corpus proceeding, held some three (3) years prior to the decision in *Jackson v. Denno*. It would seem pointless, at this stage of the proceedings, to require the state courts of Texas to redetermine the issue of voluntariness. Such a ruling, as was made by the court below, will confound and confuse the proper administration of justice and give unmerited comfort to those state defendants who have been prolific and consistent writ seekers in the Federal courts over the years.

Petitioner suggests that the *Jackson* holding, requiring a state evidentiary hearing on the issue of voluntariness, should not be applied to a situation where the defendant has had the question fairly decided in an evidentiary hearing in Federal court prior to the decision in *Jackson*. This situation is almost certainly not unique to the instant case and is an important question to be decided so as to furnish adequate guidelines to the federal courts considering the applications of state prisoners for habeas corpus relief.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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First Assistant Attorney General

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Staff Legal Assistant

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APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 24263

FRANCIS MARION BLACK,

Appellant,

versus

DR. GEORGE J. BETO, Director, Texas Department of Corrections (Board of Pardons and Paroles of Texas and/or A. C. Turner, Pat Bullock, and Jack Ross members of such Board, substituted as Appellees),

Appellees.

Appeal from the United States District Court for the Eastern District of Texas.

(July 13, 1967.)

Before TUTTLE, Chief Judge, THORNBERRY and GODBOLD, Circuit Judges.

TUTTLE, Chief Judge: Appellant was tried in June, 1938, in the District Court in Brewster County, Texas, for the murder of his adopted son. The jury found him guilty, and the conviction was upheld on appeal to the Texas Court of Criminal Appeals. *Black v. Texas,* 128 S.W. 2d 406 (1939). At the trial, appellant's signed confession was introduced in evidence against him. In this appeal from the district court's

denial of his petition for a writ of habeas corpus, the only grounds for reversal urged relate to the issue of voluntariness of that confession, and the procedure for determination of that issue prescribed by *Jackson v. Denno,* 378 U.S. 368 (1964).

Appellant's first contention is that he is entitled to have the voluntariness of his confession determined by a Texas court in accord with valid state procedures, under the requirements announced in *Jackson v. Denno.* The district court rejected this contention on two grounds. First, it decided that since appellant's counsel failed to object to the admission of the confession on the precise ground that it was involuntary, appellant effectively waived that objection. Second, it decided that in any event, the constitutional requirements of *Jackson v. Denno* were fully satisfied by an inquiry into the voluntariness of appellant's confession conducted by the federal district court in a prior habeas proceeding in 1961.

Appellant's second assertion, upon which the first is premised, is that his confession was involuntary, at least when examined in the light of present, retroactively applicable standards. On this point, the district court stated that it had reviewed all of the relevant evidence adduced, both in this proceeding and in the prior habeas corpus hearing conducted in the district court in 1961, and concluded that appellant's confession "was freely and voluntarily given, with a full understanding of the consequences thereof."

In Jackson v. Denno, supra, the Supreme Court held that the New York procedures for determining the voluntariness of a confession, under which that issue was presented to the trial jury unless the trial judge made

a preliminary finding that it could not be deemed voluntary under any circumstances, was constitutionally invalid. The Court held that a defendant had a constitutional right to a fair hearing and reliable determination of the voluntariness of a confession not influenced by its truth or falsity, and that this right cannot be satisfied by submitting the issue of voluntariness to the jury trying the issue of guilt.

Turning to the question of what remedy to afford Jackson, the Court held that "the further proceedings to which Jackson is entitled should occur initially in the state courts rather than in the federal habeas corpus court," and remanded the case with instructions to the district court to allow the state a reasonable time to afford Jackson a satisfactory hearing on the issue of voluntariness—notwithstanding the fact that the district court had already conducted an independent review and found that there was "no good reason to conclude that the confession of the defendant was involuntary."

The State concedes in its brief that the procedure followed by the trial court in this case was equivalent to that condemned by the Supreme Court in *Jackson*—i.e., the confession was submitted to the trial jury with instructions to disregard it if they found it to be involuntary, without a prior independent determination of voluntariness by the trial court. The district court decided, however, that Black need not be afforded the relief accorded Jackson by the Supreme Court because he effectively waived any objection to the use of the confession against him based on a claim of involuntariness, by his failure to raise that specific objection at his trial. We cannot agree with this conclusion.

It is true that Black's attorney did not make a precise challenge to the admission of the confession on the ground that it was not voluntarily made. However, when the confession was tendered in evidence, counsel did request permission to conduct an examination of the police officer who took the statement from Black. In the course of that interrogation, a number of questions, some of them suggesting the possible presence of coercive influences bearing on Black's confession, were put to the officer, and at the conclusion of the examination, Black's attorney stated: "We object [to the introduction of the confession] and don't think that sufficient evidence has been offered to permit the confession to be introduced. No proper predicate has been laid." Apparently this was sufficient to make the trial judge aware that the voluntariness of appellant's confession was a possible issue in the case for in his charge he specifically instructed the jury that it would be their duty to make a determination of the voluntariness of the confession, and to disregard it if they found that it was not freely and voluntarily given. The significance of the trial judge's recognition of a potential dispute over the voluntariness of a confession is clearly indicated in the Court's opinion in *Jackson.* There, counsel initially made no objection whatever to the admission of defendant's confession. Commenting on that fact, the Court said, "Although Jackson's counsel did not specifically object to the admission of the confession initially, the trial court indicated its awareness that Jackson's counsel was questioning the circumstances under which Jackson was interrogated." 378 U.S. 374.

In any event, *Fay v. Noia,* 372 U.S. 391 (1963), teaches that a federal judge's discretion to deny relief

to a habeas corpus applicant for a procedural default is a narrowly limited one, and that the standard to be employed is that enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)—"An intentional relinquishment or abandonment of a known right of privilege." The circumstances here presented do not we think, satisfy that standard. See *Mitchell v. Stephens*, 353 F.2d 129 (8 Cir. 1965).

Alternatively, the district court concluded that the requirements of Jackson were effectively met in this case by the inquiry conducted on appellant's prior application for habeas corpus relief in the Federal District Court in 1961. The State argues that since Black received a reliable determination of the voluntariness question in that proceeding, which occurred some three years before *Jackson v. Denno* was decided, "surely Jackson would not require a redetermination of voluntariness by a state court." The difficulty with this proposition is that the Court's opinion in *Jackson* reflects a considered choice, based upon substantive considerations, favoring state court determination of such questions. Quoting from *Rogers v. Richmond*, 365 U.S. 534 (1961), the Court explained its choice thus:

> "A state defendant should have the opportunity to have all issues which may be determinative of his guilt tried by a state judge or a state jury under appropriate state procedures which conform to the requirements of the Fourteenth Amendment. . . . [T]he state, too, has a weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its courts and juries. To require a federal judge exercising habeas corpus jurisdiction to attempt to combine within himself the proper functions of judge and jury in a state trial—to ask

him to approximate the sympathies of the defendant's peers or to make the rulings whch the state trial judge might make . . . —is potentially to prejudice state defendants claiming federal rights and to preempt functions that belong to state machinery in the administration of state criminal law." *Jackson v. Denno, supra,* at 393.

The Court of Appeals for the Eighth Circuit was confronted with a similar question in *Minnesota ex rel Holscher v. Tahash,* 364 F 2d 922, 8th Cir. 1966. There, as here, the district court had concluded that the requirements of *Jackson v. Denno* had been fulfilled by a determination of the voluntariness of the petitioner's confession made by the federal habeas corpus court. The Court of Appeals said:

> "One may well argue that when a federal court conducts a full evidentiary hearing and reaches a conclusion as to a federal constitutional issue, this should be sufficiently determinative of that issue on a post conviction attack. Nevertheless, adopting an attitude of over- rather than under' caution, we are inclined to read Jackson v. Denno otherwise. . . . We therefore conclude, absent waiver, Holsher is entitled to have the question of voluntariness of his statements determined by the state court rather than by a federal court, and in accord with valid state procedures." *Id.* at 927.

We believe that conclusion was correct. The Supreme Court has indicated as much in *Johnson v. New Jersey,* 384 U.S. 719 (1966).

Accordingly, the judgment denying petitioner's application for a writ of habeas corpus is reversed and the case is remanded to the district court with directions to allow the State a reasonable time to afford Black a hearing conforming to the dictates of *Jackson v. Denno,* failing which he is entitled to his release.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1966

NO. 24263

D. C. Docket No. CA 4452

FRANCIS MARION BLACK,

Appellant

versus

DR. GEORGE J. BETO, Director, Texas Department of Corrections (Board of Pardons and Paroles of Texas and/or A. C. Turner, Pat Bullock, and Jack Ross members of such Board, substituted as Appellees),

Appellees.

Appeal from the United States District Court for the Eastern District of Texas.

Before TUTTLE, Chief Judge, THORNBERRY and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judg-

ment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby remanded to the said District Court with directions to allow the State a reasonable time to afford Black a hearing conforming to the dictates of Jackson v. Denno, failing which he is entitled to his release;

It is further ordered and adjudged that the appellees, Dr. George J. Beto, Director, Texas Department of Corrections (Board of Pardons and Paroles of Texas and/or A. C. Turner, Pat Bullock, and Jack Ross members of such Board, substituted as Appellees), be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate: Aug. 4, 1967

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
By (MISS) JACKIE ESPOSITO, Deputy

New Orleans, Louisiana, Aug. 4, 1967

July 13, 1967
Court Costs payable to Clerk,
U.S. Court of Appeals

Docketing cause, etc. . . . $25.00

APPENDIX "C"

SUPREME COURT OF THE UNITED STATES

NO.----------, OCTOBER TERM, 1967

GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

v.

FRANCIS MARION BLACK

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Nov. 10th, 1967.

HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States

Dated this 6th day of October, 1967.

CERTIFICATE OF SERVICE

I hereby certify that copies of the Petition for Writ of Certiorari were served on the attorney for the Respondent by depositing same in the United States Mail, postage prepaid, certified mail, on this the 6th day of November, 1967, addressed as follows: Mr. Will Gray, Attorney at Law, 400 State National Building, 412 Main Street, Houston, Texas 77002.

LONNY F. ZWIENER
Assistant Attorney General